

STATE OF MINNAPPA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 28-84:

BOARD OF TRUSTEES,
MISSOULA ELEMENTARY DISTRICT #1,

Complainant,

- vs -

FINAL ORDER

MISSOULA ELEMENTARY EDUCATION
ASSOCIATION, MEA,

Defendant.

* * * * *

On December 13, 1984, Investigator Joseph V. Maronick issued an Investigation Report and Determination dismissing these charges for the reason that they lack probable merit.

Exceptions to the Investigation Report and Determination were filed by Michael W. Sebestedt, attorney for complainant, on December 18, 1984.

Oral argument was scheduled before the Board of Personnel Appeals on January 25, 1985.

After reviewing the record and considering the briefs and oral arguments, the Board finds and Orders as follows:

1. IT IS ORDERED that the Exceptions to the Investigation Report and Determination are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Investigation Report and Determination issued by Investigator Joe Maronick dismissing the charge as the Final Order of this Board.

The upholding of the dismissal of this unfair labor practice is in no way an acceptance by this Board of the Union's attempt to escape its obligations under the election of remedies clause of the collective bargaining agreement.

DATED this 1st day of April, 1985.

BOARD OF PERSONNEL APPEALS

By Alan L. Joscelyn
Alan L. Joscelyn
Chairman

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 28-84:

BOARD OF TRUSTEES,
MISSOULA ELEMENTARY
DISTRICT #1

Complainant,

vs.

MISSOULA ELEMENTARY EDUCATION
ASSOCIATION, MEA,

Respondent.

INVESTIGATION
REPORT AND
DETERMINATION

* * * * *

Background

On October 12, 1984 the Board of Trustees Missoula Elementary District #1 (the employer) filed an unfair labor practice charge with this Board alleging that the Missoula Elementary Education Association (the union) was committing violations of Section 39-11-402 (2) MCA. The complaint alleged that the union had agreed under contract that a grievance may be processed only until another form of appeal outside the contract is elected. Notwithstanding this election of remedies provision, the union first filed an appeal with the County Superintendent of Schools and then filed a grievance, both seeking reinstatement of the same teacher. Carol Anderson, a tenured teacher on leave for 1983-84 was dismissed while under contract for 1984-85. In that dismissal the union grieves violation of "Involuntary Transfer, Reduction in Staff and Leaves Without Pay" articles of the contract.

In answer the union denied any violation of the pertinent sections of Title 39, Chapter 31 MCA relied on by the employer to bring its charge. Further, the union asserted that violation of contract terms is a matter for an arbitrator, not the Board of Personnel Appeals.

Jurisdiction Question

The Employer cites in part ULP 1-75, International Brotherhood of Painters and Allied Trades, Local 1023 v. MSU et al; ULP 3-76, Firefighters v. City of Billings, ULP 5-80 AFSCME School District #5; and Eleventh Judicial District Court Flathead County Cause No. DV80-600, as holding that violation of a contract was an Unfair Labor Practice.

The refusal to process a dispute concerning a labor contract, as found in the cases cited where a contract violation occurred, was an unfair labor practice recognized by the Board.

The issue in this case is whether the violation of the terms of the contract was an unfair labor practice. The matter of the employees dismissal is now before the Missoula County Superintendent of Schools. The merits of that proceeding are not in question in this Unfair Labor Practice Charge.

As was stated in the Investigation Report and Determination in ULP 18-83 American Federation of State, County and Municipal Employees, AFL-CIO, vs City and/or County of Butte-Silver Bow et al. dated May 4, 1984:

The refusal to process a dispute concerning a labor contract, if it is in violation of the contract, is an unfair labor practice recognized by the Montana Board of Personnel Appeals, the State District Court and the Montana Supreme Court. Board decisions: ULP #1-75, International Brotherhood of Painters and Allied Trades, Local #1023 vs. Montana State University and Barry Hjort; and ULP #3-76, Local #521 of the International Association of Fire Fighters v. City of Billings. District court decisions: Board of Trustees of Flathead County School District No. 5 v. Board of Personnel Appeals and AFSCME, Cause No. DV-80-600, Flathead County; and City of Livingston v. Board of Personnel Appeals and AFSCME, Cause No. 81-159, Park County, (1983). Montana Supreme Court decision: City of Livingston v. AFSCME, et al. 174 MT 421, 571 P.2d 374 (1977).

1 As was stated by the Montana Supreme Court in
the City of Livingston, supra, case:

2 Thus, by statute, the duty to bargain
3 "in good faith" continues during the
entire course of the contract.

4 (3) The Supreme Court has held that
5 "collective bargaining is a continuing
6 process. Among other things it involves
7 ** protection of employees rights al-
8 ready secured by contract." Conley v.
9 Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.
10 Ed. 2d 949 (6th Cir. 1947). In Ostro-
11 fosky v. United Steelworkers of America,
171 F. Supp. 782, 790 (D. Md. 1959),
12 aff'd, 273 F.2d 614 (4th Cir. 1960),
13 cert. den., 363 U.S. 849, 80 S.Ct. 1628,
14 4 L.Ed. 2d 1732 (1950), the court stat-
15 ed: "*** the employer had the same duty
to bargain collectively over grievances
as over the terms of the agreement."

16 (4) Under Montana's Collective Bargain-
17 ing Act for Public Employees a failure
18 to hold a grievance hearing as provided
19 in the contract is an unfair labor
20 practice for failure to bargain in good
21 faith.

174 Mt at 424, 571 P.2d at 377.

22 When a party to a collective bargaining agreement
23 refuses to abide by the mutually agreed-upon
24 grievance procedure, then that party is repudiat-
25 ing its statutory duty to bargain in good faith,
26 and is interfering with the rights of employees
27 guaranteed to them in Section 39-31-201 MCA.

28 The Board of Personnel Appeals recognizes the
29 refusal to abide by a contractual grievance pro-
30 cedure as an unfair labor practice because such a
31 refusal strikes at the very heart of the purpose
32 of the Act - to promote labor peace via collective
bargaining. Section 39-31-101 MCA.

33 In this case, however, the employer asserts just the
34 opposite of the above cited cases. The allegation is not
35 that the union refuses to use the grievance procedure but
36 that the union is using the grievance procedure. If the use
37 of the grievance procedure under these facts constitutes a
38 violation the collective bargaining agreement, then the
39 employer's remedy is to assert such a defense in the griev-
40 ance procedure and to the arbitrator if necessary. This
41 Board has never held that the use of a contractual grievance

1 procedure is an unfair labor practice. It is the opposite
2 act which is an unfair labor practice.

3 Use of the contractual grievance procedure is always
4 favored. Defenses to the grievance procedure based on
5 allegations of contract violations must be submitted to an
6 arbitrator.

7 Determination

8 The relevant alleged facts, insofar as they are neces-
9 sary to determine here if the charge filed is with or without
10 probable merit, are the following: (1) The merits of the
11 dismissal are proceeding toward resolution through appeal to
12 the Missoula County Superintendent of schools, and (2) the
13 employer filed a ULP alleging a violation of contract terms
14 requiring election of remedies.

15 Although use of the grievance procedure under the facts
16 in this case may constitute a breach of the collective
17 bargaining agreement, the remedy for that alleged breach is
18 a suit for enforcement of the contract or is a defense to be
19 asserted in the grievance process. The alleged breach is
20 not an unfair labor practice. This is a matter more appro-
21 priately brought before an arbitrator not the Board of
22 Personnel Appeals.

23 Accordingly, pursuant to Section 39-31-405 MCA we find
24 that there is not probable merit for the charge and dismiss
25 the same.

26 Dated this 13 day of December, 1984.

27 BOARD OF PERSONNEL APPEALS

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29 By: Joseph V. Maronick
30 Joseph V. Maronick
31 Investigator
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